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The Changed Legal Profession: Who Has Control of the Market for Legal Services?

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The Changed Legal Profession: Who Has Control of the Market for Legal Services?

Frederick H. Zemans*

1. *The Growing Numbers*

During the nineteen sixties, it was provincial governments rather than lawyers or their professional societies, which determined that there would be a significant increase in the number of places for law students at Canadian universities. Formula-funding programmes (in place in several provinces) along with a growing demand for law degrees stimulated government-funded universities to open their doors to students seeking a legal education and ultimately entrance to the legal profession. Prior to the late seventies, little opposition was encountered from the profession to its loss of control of the supply of lawyers. The economic recession, combined with the growth in the number of practicing lawyers, created awareness of the three fold increase in full-time places at Canadian universities for law students. The last decade has seen stagnation in the number of law students with little likelihood of further growth.

Nor is it likely that cut-backs will take place in Canadian legal education, for despite concerns expressed by individual lawyers, some provincial law societies, and local bar associations, there is no political will, among the provincial governments of the late eighties, to close law schools or for that matter to substantially cut back law student numbers. Canadian law schools are grappling in the eighties with pedagogy, academic goals and with bringing legal education into the mainstream of the academy. (The growing number of law professors who see themselves as university professors rather than as members of the legal profession is strengthening this process¹.) Although legal education has traditionally been and continues to be underfunded by comparison to medicine or dentistry, pro-

* Professor of Law, York University (February, 1988).

1 See Glasbeek & Hasson "Reflections on Canadian Legal Education", (1986) 50 *Modern Law Review* 777.

vincial governments have taken a liberal attitude towards the accessibility of legal education².

The considerable growth in the number of law students has resulted in a rapid increase in the absolute number of Canadian lawyers, the increase in female lawyers in particular, and the further concentration of lawyers in urban centres and large law firms³. Between 1971 and 1980, the number of lawyers in Canada doubled — reflecting the doubling of law school enrollments in the latter six years of the 1960s. This placed extreme pressure on a highly regulated profession within the confines of an "imperfect labour market"⁴.

From 1951 to 1981, the legal profession grew by nearly 300 percent (from 9,000 to 34,000 lawyers)⁵. Between 1951 and 1971 the total increase was 80 percent, while from 1971 the profession increased at an escalated rate of 10 percent per annum. It should be noted that other

2 Although part-time and night school programmes which would make legal education less elitist have been discouraged, the provinces have not been prepared to control the legal services market and arbitrarily limit the supply. Quotas and exclusions are the most obvious and easily enforced method of restricting the numbers in any occupation. Quotas are a simplistic restriction on the number of new members in a profession which can be imposed by either the state or the profession. Contemporary liberal governments generally consider explicit state control as inconsistent with the concept of an "independent" profession or the free market. We therefore find few countries where the state is prepared to control the supply of new professionals. This is particularly the case with the legal profession where much of the increase in numbers is coming from groups that have traditionally been outsiders to both law and to power, such as women, blacks and immigrants.

3 The total number of lawyers increased by 109% from 1971 to 1981. The proportion of lawyers who were members of large firms increased from 6% to almost 14% during the same period. See David A.A. Stager and David K. Foot, "Changes in Lawyer's Earnings: The Impact of Differentiation and Growth in the Canadian Legal Profession", (1988) 13 *LAW & Social Inquiry* 71 at 75-80.

4 David A.A. Stager "Are There Too Many Lawyers?" (1983), IX *Canadian Public Policy* 245-249. One of the examples referred to by economists such as Stager with respect to the imperfections of the legal services market is that although there are thousands of smaller law firms, they receive a small share of the total income of legal services fees generated, while the small number of large law firms account for one-third of the fees revenue generated by Canadian lawyers.

5 When we discuss the composition of the legal profession in Canada, all statistics include Quebec notaries who are required to have a law degree from a recognized university and some notarial experience, prior to taking examinations set by the Quebec Board of Notaries. The Quebec notary is a lawyer who specializes in non-litigious legal work and is comparable to the British solicitor.

professions increased at comparable pace. A larger postwar expansion of 310 percent was experienced by the architects and engineers during the same 30 year period. (In that case, the substantial growth came during the first two decades at a rate of 132 percent — 50 percent higher than the legal profession⁶.) Similarly, the medical profession doubled its numbers between 1951 and 1971. The growth rate for the legal profession in Canada during the 1970s, however, was considerably greater than that in other industrialized nations and double the rate of the other traditional professions in Canada⁷.

The growth rate was similar throughout Canada, despite the unique role of the profession in Ontario — The Law Society of Upper Canada — which retained a virtual monopoly on legal education in that province until the late '50s. Although various groupings of Ontario lawyers have recently expressed concern for the issue of "too many lawyers", Ontario had the second lowest rate of increase among the provinces⁸. The extent to which the increase in the number of lawyers during the '70s can be attributed to the entrance of women to the legal profession will be examined later in this paper⁹. Between 1951 and 1981, the increase in the number of lawyers was 500 percent in Alberta; 402 percent in British Columbia; 297 percent in Ontario; and 225 percent in Quebec.

The question remains as to whether the relatively rapid increase in

6 Labour force in selected professional occupations, Canada 1931-1981.

7 Ibid. During the seventies medicine, engineering and accountancy increased at rates of under fifty percent as compared to lawyers and notaries whose professional numbers increased at the rate of 109 percent. See also David A.A. Stager and David K. Foot, *Supra* Note 3. The lawyer growth rates for the 1970s were 50 to 60 percent in the United States, the United Kingdom, Germany and New Zealand, and 75 to 80 percent in the Netherlands and Belgium. See P.S.C. Lewis, "A Comparative Perspective on Legal Professions in the 1980s", 20 *Law and Society Review*, 80-91.

8 As discussed later, much of the concern for the increase in numbers was a legitimate sense of decline in economic position by sole practitioners and lawyers practicing in smaller firms, particularly in smaller communities.

9 See R. Abel "The Politics of the Market for Legal Services" in *Law in The Baisance, Legal Service in the Eighties*, Oxford, (1982) 4-9. Abel writes that between the turn of the century and 1960, as a result of World War II and other factors, the number of lawyers did not keep pace with the demand for legal services. He attributes the unprecedented world wide growth of the profession since 1960 to the baby boom and the entry of women. Abel's analysis leads him to conclude that all increases in the rate of growth of the legal profession after 1973 are attributable to the entry of women.

lawyers' numbers during the last decade has significantly affected the market for legal services in Canada. Recent census data are valuable in determining where and to whom the expanded profession is providing legal services¹⁰. Not unexpectedly, the growth rate varied considerably for different segments of the profession: the number of lawyers in private practice and in non-profit organizations increased at the average rate (102 percent); lawyers in public administration increased by 130 percent; and those in private industry grew by only 80 percent¹¹. Despite the considerable increase in numbers and particularly of women, currently available data indicates that the distribution of lawyers does not seem to have changed significantly. Closer examination of recent census data reveals variations worthy of note with respect to women, larger law firms and younger lawyers. Although the number of male lawyers had only dropped to 89.8 percent, the presence of women in the legal profession was confirmed during the '70s. During the same decade, the percentage of Protestants remained constant while the percentage of Catholics rose nearly four percent and the percentage of Jewish lawyers dropped from 13.4 percent to 10.7 percent.

Another significant change was in the geographic location of Canadian lawyers. Lawyers have generally responded to economic incentives. We are therefore not surprised to note the considerable growth of the legal profession in western Canada, with 30 percent of Canada's lawyers located in British Columbia and the Prairies in 1980 as compared with 27 percent a decade earlier¹². In 1970, 54 percent of the legal profession was based in larger cities; by 1980, the percentage of urban lawyers had grown to

10 *Supra* note 3 at 77-78.

11 *Ibid.* Table 1. Stager and Foot statistics indicate relatively minimal changes in the type of work that lawyers in Canada were doing in 1981 as compared to 1971:

	1971	1981
Law Offices	84.0	83.4
Public Administration	8.7	9.9
Private Industry	5.0	4.7
Other Industries	2.3	2.0

12 The changing economic reality of Canadian lawyers during the seventies is confirmed by the substantial increase in the earnings of lawyers on the Prairies who were earning \$6,500 per annum more than lawyers in central Canada by 1980. This increase in income reflected that demand exceeded the doubling of numbers, that resulted principally from the expansion of Alberta's oil-based economy.

62 percent. Upon closer examination, we find even greater growth in the concentration of lawyers in the core of our major cities: 10 percent of the profession practicing in Toronto in 1980 compared to only 4 percent in 1971. (Similar developments took place in Edmonton, Calgary and Vancouver and to a lesser extent, in Montreal.) Though lawyers in Canada, today, are younger, they are working in very similar settings to their seniors, locating to an even greater extent in urban centres and larger firms¹³. There is no doubt that the increase in numbers has lowered the lawyer-client ratio in most communities. Parallel to this increase, there has been a growth in lawyers working as salaried employees both in the private and public sector, and a decline in the number of graduate lawyers who actually practice law¹⁴.

The increase in size of the profession has necessarily stimulated a change in the age composition of the profession. In 1951, 27 percent of the legal profession in Canada was aged 25 to 34 and a similar number of lawyers were 55 years of age and over. In 1981 the number of lawyers aged 55 and over had dropped to 10 percent of the legal profession while 48 percent — nearly one-half of the profession — were under age 34.

The perception of many lawyers, as well as the leadership of the profession, is that the increase in numbers has created a surplus in lawyers but, it is difficult to determine when there is actually a "surplus" in any professional monopoly unless one is able to determine whether the increase

13 *Supra* note 3 at 74, Table 1

	— Percentage —	
	1971	1981
Age (years)	41.1	38.2
Male	96.8	89.8
Female	3.2	10.2
Protestant	52.2	51.5
Catholic	34.5	38.2
Jewish	13.4	10.7
City Core		
Montreal	1.8	3.0
Toronto	3.7	9.9
Edmonton/Calgary	1.0	3.6
Vancouver	1.2	3.1
Non-core	92.3	80.1

14 The increased percentage of salaried lawyers is attributable to the growing number of younger lawyers and the growth of the large urban law firms that hired an increasing number of younger lawyers.

in numbers has seen a marked decline in the cost of professional services or an increasing availability of services. Until very recently there was limited analysis of lawyer's incomes in Canada and little evidence to assist in understanding the changing market and, particularly, the significant restructuring of the profession.

Declining income is cited by Canadian lawyers and their professional associations as the primary concern with increasing numbers of lawyers. The University of Toronto studies reveal that the average real earnings of all Canadian lawyers decreased by 15.7 percent during the seventies¹⁵. A close analysis of the census data indicates that although lawyers' incomes dropped generally — principally because of the rapid growth in numbers of the profession — it is necessary to differentiate between various groups within the profession to clarify the impact of the increase in supply. Despite the general decline in lawyers' incomes and the substantial decline in income of lawyers practicing in smaller communities — particularly in rural Ontario — lawyers in the financial core of Canada, despite their increasing numbers, saw considerable increase in their incomes during this period. Market differentiation was particularly evidenced by the increasing earnings of large law firms in the downtown financial centres — especially Montreal and Toronto — that had existed in 1970, but had become even greater by 1980¹⁶.

Stager and Foot indicate that over one-third of the total decline in the profession's income resulted from the increasing proportion of younger lawyers along with the increase in the numbers of female sole practitioner and salaried lawyers¹⁷. Although there was a slight increase in lawyers' earnings this was more than offset by a 13 percent decline that was attri-

15 I am particularly indebted to the recent work of both David A.A. Stager and John Hagan whose unpublished recent studies have been made available to me and have provided me with new insights into the changes in the structure of the Canadian legal profession. My analysis of income draws from findings of Professors Stager and Foot in their published and unpublished papers.

16 Stager and Foot, *Supra* note 3 indicate that Core/Non Core differentials in 1970 were "very large" for Montreal and Toronto (\$13,500 and \$11,000). By 1980, the earning differentials for these metropolitan cores were even larger: for Montreal it was \$16,400; and an increase by nearly 50 percent in Toronto to \$16,000. In Edmonton/Calgary the differential was \$5,800 and for Vancouver it was \$7,100. These variables underline the growth in size and income of the larger law firms located in the core of the major Canadian cities, particularly Toronto and Montreal.

17 The increasing numbers of younger lawyers impacted most significantly on smaller firms and solo practitioners who found themselves in direct competition with the

butable to the inability of the market for legal services to expand as rapidly as the increasing supply of lawyers¹⁸. It is significant to note that while lawyers in private practice saw a drop in average earnings of over 17 percent, the average earnings for lawyers in government service declined by only 1.1 percent.

Stager and Foot confirm not only that lawyers practicing in larger and elite law firms did not suffer during the seventies but, in fact, they prospered. The data clarifies why the primary concern for the increasing size of the profession emanated from lawyers practicing in smaller firms and, particularly, lawyers practicing in smaller communities. Self-employed lawyers suffered a 17.6 percent drop in income, while lawyers practicing in non-core areas in Ontario suffered a drop of nearly one-third of their income¹⁹. Stager and Foot attribute most of the loss of earnings of lawyers practicing in non-core areas to changing market conditions (28.3 percent), approximately twice the impact of these conditions on all lawyers in private practice.

Considering recent developments with respect to the legal profession in industrialized countries, Richard Abel asserts that "the income and status of the profession as a whole have declined"²⁰. It is perhaps early to determine whether the general fall in income of Canadian lawyers will continue during the '80s or to assert that there has been any significant decline in the power or status of the profession. Rather it would seem

burgeoning number of younger lawyers who set up practice on their own. Lawyers in larger law firms are not in competition with younger lawyers but rather determine whether to expand the size of their firms and whether younger lawyers should be hired. The younger lawyer's fate is greatly dependent on the larger law firm's hiring policies.

Stager and Foot state that almost three-quarters of the composition effect — or about 35 percent of the total decline in income was the result of the increasing proportion of younger lawyers. The balance of the compositional effect was due to relatively more female, single and salaried lawyers. An improvement in the remuneration associated with employment characteristics actually added 5.6 percent to lawyers' earnings — principally through a relative improvement for salaried lawyers, and for those working in the financial cores of Toronto, Edmonton and Calgary.

18 Stager and Foot refer to the "market effect" by which they mean "the greater increase in supply than in the demand for lawyers' services".

19 *Supra* note 3 at 81, the drop in income of lawyers located in non-core centres was 30.3 percent.

20 Richard Abel, "Comparative Sociology of Legal Professions: An Exploratory Essay", *American Bar Foundation Research Journal*, (1985) 5-79 at 57.

that we are seeing clearer divisions within the legal profession and a growing recognition that only a limited number of lawyers will have entrance to the powerful partnerships of the elite law firms. Although the income of specific groupings of Canadian lawyers has clearly declined, it is difficult to argue that the decline will be permanent or that professional prestige has significantly been undermined. As a profession, lawyers remain towards the top of the professional income strata. Because of the high incomes and prominence of the elite law firms, the profession continues to be an attractive career for the large numbers of university students who apply for the limited places available at Canadian law schools.

The recent census data clarifies what was previously suspected — that the rapid increase in demand for legal services in the late 1960s and early 1970s declined during the later '70s. This considerable decline in demand for legal services coincided with the rapid growth in supply adjustment in terms of law school enrollment, particularly by women. It is worth noting that some economists have asserted that, during the twentieth century, the market for legal services has responded to periods of high demand through extended periods of adjustment leading to long-term equilibrium and that, on balance, there have generally been too few lawyers. In 1981–82, the number of lawyers in private practice in Ontario increased by 3.4 percent. During the five years from 1976 to 1981, the numbers increased at an average annual rate of 4.4 percent while over the previous five years, the average annual increase was 6.8 percent. The number of lawyers in private practice is increasing more slowly in the 1980s than it did in the 1970s. This is due to the fact that places at law schools have not increased and the percentage of the profession in private practice has declined from close to 90 percent to approximately 70 percent in most provinces.

We are in the midst of a period of adjustment in Canada. The extending domination of the market for legal services by the larger law firms and the declining percentage of lawyers entering private practice indicate that significant adjustment, or for that matter tinkering with the supply side of the market, is neither realistic nor for that matter necessary²¹.

21 Stager makes much the same point. He suggests that enrollments at Canadian law schools have increased very little since 1975, as have the number of graduates since 1977, while the number of new lawyers has declined since 1978: "These plateaus are noteworthy because they are unique in the past two decades, and appear to represent

Considerable sentiment has existed within the profession to restrict the number of entering lawyers²². Understandably the most vociferous provincial bar was Ontario. In 1970, Ontario lawyers earned more than similar lawyers in all other regions. By 1980, Ontario lawyers found themselves at the bottom of the earnings ladder. Although earnings of Ontario lawyers as a whole were much the same as the profession in Eastern Canada, they were significantly lower than in the Prairies (by \$ 6,500) and British Columbia (by \$ 3,300). Not surprisingly the changing position of the Ontario bar was of greatest concern to lawyers practicing in smaller firms and in non-urban settings who were not insulated from the declining demand for legal services, nor were they in a position to expand their economic base by developing interprovincial or even international legal practices. In response to these concerns and demands that the profession deal with their concern about numbers, The Law Society of Upper Canada struck a committee to consider its options²³. The Committee's report recognized that the recurring conclusion that there are too many lawyers has generally coincided with slumps in the economy²⁴. The Committee ultimately concluded that the Law Society had no way of unilaterally controlling the numbers of persons who may be called to the

a return to long-run equilibrium in the lawyers' market". David Stager, "Are There Too Many Lawyers"? IX *Canadian Public Policy* 2: 245–249.

22 In a 1981 survey of the Ontario legal profession, 73 percent felt that controls on entry would benefit the public and 85 percent felt controls would benefit the profession. "The Views of the Practicing Bar", (1983) 6 *Can.-U.S. Law J.* 103 note 28, at 33–34.

23 The Law Society of Upper Canada formed The Special Committee on Numbers of Lawyers in February 1981 to "enquire into all aspects of the matter of the number of lawyers entering into practice, the resulting effect on the standards of practice and the welfare of the profession and the consequent advantages and disadvantages to the public". The Committee was composed of 12 members and it is interesting to note that two-thirds of the members were from Toronto with nearly half being from large firms (over 20 lawyers) and one-third from "elite" firms with partners sitting as directors of "elite" Canadian corporations. One-quarter of the committee were from firms with approx. 100 lawyers with a comparable number from smaller firms of six lawyers or less located in Huntsville, Orangeville and Hamilton. One member of the committee was a lay bench (non lawyer) from Sudbury.

24 1983 *The Law Society Gazette* 222 at 223. The report cites Smith's Canadian Gazette published in 1845 "... Much has been written on the subject of emigration, and many speculations entered into as to who are the proper persons to emigrate? ... Lawyers are not wanted: Canada swarms with them: and they multiply in the province so fast, that the demand is not by any means equal to the supply". There were 450 lawyers in Upper Canada in 1846 serving a population of 726,000.

bar²⁵, and the Committee's recommendations as to restricting the number of graduates from the Bar Admission Course or the restricting of entrance to the Bar Admission Course were not accepted. The Committee reported that any attempt by the profession to restrict numbers would result in a considerable public outcry to the prejudice of the profession²⁶ and that there would be little or no support from the current or previous provincial government.

2. Legal Services Delivery

The development of legal aid in Canada during the last several decades is of significance because of its stimulation, broadening and diversification of professional roles both in the private and public sectors. Legal aid and prepaid legal services are supply-side generation examples within the market for legal services. A recent phenomenon, legal aid, has been the major impetus for the development of non-traditional lawyering in Canada. Some writers have suggested that the substantial input of public funds into the Canadian legal profession to represent the poor has had a greater impact on lawyers and their professional careers than it has had on low-income Canadians. Legal aid programmes have not only stimulated lawyers to begin to develop legal aid practices in criminal and, to a lesser extent, in family law but have, in several Canadian provinces, provided the funding and the structure for lawyers to become salaried professionals in either community-based legal services clinics (Ontario, Nova Scotia, Prince Edward Island and Saskatchewan) or government legal aid bureaus (Quebec and Newfoundland).

The governing bodies and professional organizations of Canadian lawyers have exhibited a growing interest in legal aid matters since the creation of the Ontario Legal Aid Plan in 1967. The provincial law societies have attempted to administer the legal aid plans through committees

25 L. Hunter, "Are There Too Many Lawyers? The Government's View" (1983) 6 *Can.-U.S. L.J.* 199.

26 "The Report of the Special Committee on Numbers", (1983) 17 *L.S.U.C. Gazette* 222 at 238 and 234 concluded that "the imposition of controls either during the Bar Admission Course or at the stage of entrance into it cannot be justified..." and acknowledged that limitation of places in law faculties "would involve the appropriate government ministries entering into discussions with the universities...". Having also received an opinion that it lacked statutory power to limit numbers, the Law Society did not seek amending legislation to acquire such power.

generally composed of lawyers. Alternatively, if such direct control was opposed by government, the law societies sought a significant voice in the administration of legal aid plans while simultaneously asserting their members' claims to adequate payment for legal assistance. The organized legal profession's intentions and attitude towards legal aid have often been unclear. The Canadian legal profession's positive response to government funded legal aid grew out of legal aid's stimulation of employment and provision of income for the growing number of young lawyers as well as the enhancement of the profession's image in its assistance of some of the country's impoverished. The profession's desire to retain "control" of legal aid plans is an outgrowth both of its guild-like mentality and its desire to avoid the socialization or nationalization of the legal profession in a fashion comparable to that of the Canadian medical profession.

It is significant that institutionalized legal aid was so late in coming to Canada. Historically, little has been written about the provision of legal services to the poor in Canada. The limited statistics and descriptions available create the impression that little concern was shown for the unrepresented or impoverished litigant by either the federal or provincial governments or the legal profession prior to World War II. Subsequent to 1945, Canadian lawyers remained preoccupied with traditional lawyering and little professional time and few resources were expended on legal aid²⁷.

Canadian lawyers from all indications had little need for legal aid clients or limited economic incentive to develop government-funded legal services prior to the 1960's. During this period a limited number provided *pro bono* assistance on an *ad hoc* and infrequent basis. It is only in the last decade that legal aid has been accepted as a joint venture of the pro-

27 The extent to which legal aid has grown in Canada can be demonstrated by briefly examining the development of representation of persons facing criminal charges in Ontario where the first provincially-funded judicare scheme was established in 1967. In a twenty year period representation of persons facing criminal charges grew from 1,587 persons in 1963 to the representation of nearly 41,000 persons in 1983 by the judicare scheme at a total cost of \$21 million, or \$523.86 per case.

Martin Friedland, *Legal Aid Working Papers* 1964, Part III "Legal Aid in Ontario, 1963 — A Statistical Summary" at page 6, prepared for The Joint Committee on Legal Aid. Friedland states that these statistics may actually be high as the data compares charges handled by legal aid, with 1961 Dominion Bureau of Statistic figures with respect to persons charged.

1983 *Annual Report*, Ontario Legal Aid Plan, The Law Society of Upper Canada at p. 49.

vincial law societies and the federal and provincial governments. In 1967 the Ontario government was encouraged by a profession based-study to introduce the first funded legal aid programme in Canada. The programme provided private lawyers with 75 percent of their prescribed fees for representation in significant criminal and civil litigation where the client was deemed to be financially eligible.

Models of legal aid

The development of legal aid services in Canada is a reflection of the country's federal political system. Because the provinces have responsibility under the *Constitution Act, 1867* for the administration of justice²⁸, the delivery of legal aid services is essentially a matter for provincial decision-making. For this reason, each province in Canada administers its own individual legal aid programme, with resulting diversity in services²⁹, delivery systems and administrative structures.

As with most legal aid systems that have developed since 1945, Canadian legal aid services are oriented towards representing clients involved with the courts, and an attempt is made to compare the legal aid recipient with the fee-paying client in determining whether services should be given. In fact, legal aid schemes have continued to ignore the differences between the recipient of legal aid services and the typical users of the legal system, rather than acknowledging that "poor people are not the same as rich people" and that their problems are not the same³⁰. In addition to providing legal services for representation by counsel before the courts, many Canadian legal aid schemes have adopted the Scottish duty counsel system — that a lawyer be provided to anyone who has been taken into custody or charged with an offence. In some of the more remote areas of the country, including the Yukon and the Northwest Territories, duty counsel lawyers travel with the court itself³¹. Duty counsel are generally

28 *Constitution Act, 1867*, 30 & 31 Victoria, c. 3, s. 92(14).

29 This diversity is described in Frederick Zemans "Canada", in *Perspectives on Legal Aid: A Comparative Survey*, ed. Zemans (London: Frances Pinter, 1979), 93-133. See also Frederick Zemans, "Recent Trends in the Organization of Legal Services", in *The General Reports for the VIIIth International Congress on Procedural Law*, ed. Habsheid, (Würzburg, 1983), 395-397, (1986) Queen's University Law Journal.

30 See generally, Stephen Wexler, "Practicing Law for Poor People", (1970) 79 *Yale Law Journal*, 1049.

31 The Northwest Territories has supplemented its *judicare* model with two clinics in remote areas.

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private lawyers paid on a *per diem* basis³².

The need for legal aid to be provided independently of government, notwithstanding governmental financial support, has been generally recognized in the arrangements adopted by Canadian provinces. Only in Prince Edward Island are legal aid services provided directly by the provincial Justice Department. In seven provinces, independent corporations were created, generally by statutes³³. In both Ontario and New Brunswick, legal aid is provided under the direction and administration of a committee of the Law Society.

In New Brunswick, Alberta and the Yukon, legal aid is delivered primarily on the "*judicare*" model. Services are provided by lawyers in private practice who bill the legal aid programme for services rendered in accordance with a prescribed tariff. In contrast, in Nova Scotia, Saskatchewan and Prince Edward Island, almost all legal aid is provided by salaried lawyers with only a small proportion of services offered by private lawyers. In Ontario, while the vast majority of services are provided by private lawyers under the *judicare* scheme, an expanded community clinic system as well as a small segment of the duty counsel programme utilize salaried lawyers. In most other provinces, legal services are similarly provided in a mixed delivery system which has become known as "the Canadian compromise" because of its melding of English *judicare* with the American community-based salaried lawyer system³⁴.

Ontario has the most successful of the mixed delivery systems yet developed. Although initially opposed to community-based clinics, with their salaried lawyers and more broadly-based welfare rights agenda, the profession in Ontario has grudgingly come to accept the concept of the community-based clinic. The Ontario profession's acceptance of a partial welfare rights approach to legal aid was brought about in no small

32 In Ontario salaried full-time duty counsel have been hired on a contractually limited basis to appear on bail applications and guilty pleas in the criminal courts of Metropolitan Toronto. As well, part-time duty counsel have begun to appear in the family courts on behalf of unrepresented parents and spouses before the courts on domestic and child welfare matters.

33 The exception is Alberta where the independent organization — The Legal Aid Society of Alberta — was established in 1973 as an incorporated society under the *Societies Act of Alberta*, R.S.A. 1970, c. 347. (Certificate of Registration No. 7163).

34 The Canadian compromise varies from *judicare*/staff in Manitoba and British Columbia; to staff/*judicare* in Newfoundland and Quebec and includes *judicare*/clinics in Ontario and the Northwest Territories.

measure by two judicial inquiries which endorsed the clinic model and encouraged funding of clinics with a community orientation, along with the de-emphasis of case-by-case legal services³⁵. There are currently over sixty clinics in Ontario, each operating with some of the features of the original American welfare rights or store front model of legal services. Many of these clinics provide specialized legal services or serve specific constituencies or ethnic communities. Community-elected boards of directors are authorized by regulation to set both case criteria and financial eligibility standards. Some clinics move beyond a service-dominated programme to attempt a more reform-oriented approach to the provision of legal services. As an auxiliary to the original judicare scheme, the Ontario clinics have generally developed a strategic approach to legal services and in most instances, have moved beyond a service model to become involved in community education, community development and some significant law reform litigation.

The significance of the variety of models of legal services in the '80's should not be overemphasized. The predominant concern of Canadian legal aid is to deal with the discrete claims and readily categorized legal problems of clients who present themselves to legal services programmes³⁶. Thus, despite the diversity of delivery models, the emphasis on case-load in judicare provinces is echoed in salaried lawyer schemes such as Quebec's. In other words, legal aid in Canada has followed the traditional approach of the legal profession by responding to the individual needs of the clients.

The unfortunate reality of the Canadian system is that government decisions as to models of legal services are generally based on cost control rather than an analysis of the most effective utilization of limited public resources. Avrim Lazar, a federal evaluator of legal aid programmes in Canada has written:

When money was more readily available, discussion about legal aid concentrated on meeting needs. Now discussions focus on controlling cost. But the objectives of legal aid have not changed, they still relate to meeting needs. What has changed is the resources

35 *The Report of the Task Force on Legal Aid*, Mr. Justice Osler, Commissioner, (Ministry of the Attorney General, 1974); and the *Report of the Commissioner on Clinical Funding*, Mr. Justice Grange, Commissioner (October, 1978).

36 Marc Galanter, "New Patterns of Legal Services in India", (paper prepared for the Conference on the Career and Prospects of Law in India, University of Wisconsin, Madison, June, 1982).

available in legal aid. Thus, this, like our newly heightened interest in the cost of justice, is a result of government financial restraint³⁷.

From the cost perspective, two provincial studies which compared salaried and private lawyers have reached opposite conclusions. A British Columbia study analyzed the cost of delivering criminal legal aid services under a salaried public defender system and concluded that there was little difference in per unit cost of services whether provided by a salaried lawyer or through a fee-for-services model using lawyers in private practice. In contrast, a 1984-85 study of Quebec's mixed delivery system confirmed the cost effectiveness of the salaried model which had been demonstrated in earlier Quebec studies³⁸.

Since, however, both salaried and private lawyer schemes provide similar services, the cost-effectiveness debate becomes a digression from the crucial discussion of the democratization of legal services and provision of appropriate legal services to respond to the socio-economic needs of underprivileged and low income persons. Mossman writes in her study on "Legal Aid in Canada"³⁹:

To an extent, the focus on the cost-effectiveness has distracted from, rather than contributed to, a better understanding of legal aid objectives. Thus, rather than questioning decisions about equality objectives or the approaches to providing legal aid services, most legal aid efforts have been directed to assessing models of delivering such services; and because both salaried and private practice lawyers provide essentially similar services, the focus on cost effectiveness has been directed very narrowly indeed.

Cost effectiveness may also be assessed from the perspective of the "expertise" or experience of fee-for-service and salaried lawyers delivering the services. The cost effectiveness ratio is affected by the time required of both private and public lawyers to handle a case. The British Columbia and Quebec studies as well as an Ontario study suggest that a specialized

37 Avrim Lazar, "Legal Aid in the Age of Restraint", quoted in M.J. Mossman, "Legal Aid in Canada" 48-49 (unpublished).

38 The 1984-85 Quebec study confirmed three previous studies that the staff lawyer system is more cost effective. A similar 1987 Manitoba study comes to the same conclusion. *Legal Aid Delivery Modes: A Discussion Paper*, National Legal Aid Liaison Committee, 1987 at 38-42.

39 Unpublished study available through Osgoode Hall Law library, York University, North York.

private bar may be developing to provide legal aid services, at least in criminal law matters. It also appears that there may be less experience or "expertise" among the private practitioners handling legal aid matters. Whether the private bar members who are willing to handle legal aid cases are developing comparable expertise and experience to the salaried clinic lawyers is a question which current research does not allow us to answer. An increase in the fees paid to private practitioners would undoubtedly attract more experienced counsel to handle legal aid matters but would similarly increase judicare costs.

Support of Professional Leadership

Judicare systems have generally required that lawyers accepting legal aid certificates contribute part of their fee by reducing their accounts by 25 percent⁴⁰. This legislated charitable contribution grew out of similar requirements in other judicare countries and attempted to recognize that the legal profession was concerned about the plight of the poor who were only now being admitted through the assistance of government funding to the ante-chambers of justice. This concept of fee contribution was based on the expectation that the entire legal profession would participate in legal aid services and that both young and old lawyers, as well as large and small firms, would assume their collective social responsibility. Unfortunately, recent data indicate that less than 50 percent of the legal profession have remained on the legal aid panels and that the vast majority of those on the panels handle a minimal number of cases⁴¹.

In virtually every province of Canada, the profession remains suspicious of the legal aid lawyer who leaves the private sector to become a staff lawyer. Despite the fact that there are now many private practitioners who are virtually full-time judicare lawyers handling varying ratios of criminal, civil and immigration matters, the organized profession continues to schunt the salaried legal aid practitioner⁴². Clinic lawyers have tended

40 The first Canadian judicare scheme was established in Ontario in 1967. The 25 per cent reduction in fees was criticized by the Osler Commission in 1975 but remains an inherent part of the plan's administration. See the *Legal Aid Act*, R.S.O. 1980, c. 234, s. 22(1).

41 *Supra*, note 35.

42 For an interesting examination of this tenuous relationship see Pauline Morris and Ronald N. Stern, *Cui Bono? A Study of Community Law Offices and Legal Aid Society Offices in British Columbia* (Vancouver: Ministry of the Attorney-General, 1976). See

to associate primarily with other clinic employees and have in some instances taken the anti-professional step of joining or associating with a clinic union⁴³. Such nontraditional steps have tended to further alienate the clinic lawyers from the mainstream of the profession. Although slightly more integrated into the mainstream of the Canadian legal profession, private legal aid specialists are perceived as being on the fringes of the profession and have tended to practice in collectives or to locate their offices in one area or one building of major centres. Many of these legal aid specialists have been the prime movers in the development of "left-wing" law groups such as Ontario's Law Union and the Lawyers for Social Responsibility⁴⁴.

From the outset of legal aid in Canada an uneasy partnership has existed between the legal profession and government. The profession has been committed to expanding legal aid and to resisting attempts to deplete its power and authority with respect to both the delivery and administration of legal aid. Although initially opposed to community clinics, the judicare jurisdictions — particularly Ontario — have responded to the political pressure of government to broaden the legal aid agenda and have in some instances incorporated the community clinic into "their" legal aid scheme. The possessiveness and involvement of Canadian lawyers in legal aid has assisted in the continuing growth of legal aid budgets during the last decade⁴⁵. Although initially opposed to community clinics and particularly

also the "Brief Presented on Behalf of the British Columbia Section of the Canadian Bar Association Concerning the Burnaby Public Defenders Pilot-Project Study" (1982) at 7. The B.C. Branch's brief also criticizes a number of conclusions of the Burnaby report and disputes several of its assumptions, including assertions that the lawyers in the pilot project were average criminal lawyers. The Bar clearly rejected the concept of staff or salaried legal aid lawyers.

43 In Ontario, thirteen of the community-based clinics are unionized with the vast majority of the membership composed of community legal workers and support staff. Some articling students and staff lawyers have joined the union. Ten clinics have joined the Ontario Public Services Union (O.P.S.U.), while two clinics are affiliated with the Steelworker's Union, one clinic has affiliated with the Canadian Union of Public Employees (C.U.P.E.). Staff lawyers working in legal aid are unionized in Quebec and Manitoba and most clinics are unionized in Saskatchewan with all legal and non-legal staff members of the union, in those clinics that have unions.

44 See Robert Martin "The Law Union of Ontario" (1985) 7 *Law & Policy*, 51-60. Much of the pressure for reform of legal aid and the legal profession comes from the more progressive members in these organizations.

45 The cost of legal aid in Canada has continued to increase. For example, the total

to their competition with the predominant *judicare* model, as well as their potential for removing legal aid from the private sector, the profession has remained involved in the debate. In response to the inception of community clinics, the profession commissioned its own "independent" study in 1972, which reviewed the arguments for and against salaried legal services and not surprisingly concluded that:

Except for limited special purposes which may suggest the full engagement of a solicitor for Legal Aid purposes, we remain of the view that the public is better served by a profession forced to compete for public patronage (rich or poor) in circumstances most likely to offer the public a meaningful choice and where the lawyer is only paid for the work done⁴⁶.

It is not surprising that the Law Society of Upper Canada attempted to assert the requirement of competition for legal services, couching its

expenditures rose from \$62 million in 1975-76 to \$90 million in 1978-79 and were up to \$180 million in 1984-85, of which approximately 90% was paid by governments (both federal and provincial). The remaining amount was paid for by interest on lawyers' trust accounts and client contributions and resources. In the same periods the per capita expenditure rose from \$2.70 to \$3.84 and finally to \$7.22 in 1984-85. The latter figures are averages; actual per capita expenditures varied tremendously across the country and have increased exponentially in the six years between 1978-79 and 1984-85:

Province/Territory	Per Capita Expenditure, Legal Aid	
	1978-79	1984-85
Newfoundland	\$1.08	\$2.43
Princ Edward Island	.68	1.55
Nova Scotia	2.14	4.12
New Brunswick	.99	2.81
Quebec	5.06	9.17
Ontario	4.00	7.77
Manitoba	3.29	7.79
Saskatchewan	3.91	5.85
Alberta	2.08	4.90
British Columbia	3.83	5.76
Yukon	5.35	34.93
Northwest Territories	7.85	37.49

The total dollar expenditures in Ontario alone have gone from \$34 million in 1978-79 to almost \$70 million in 1984-85. In Quebec, total expenditures grew from \$31 million in 1978-79 to \$60 million in 1984-85. See *Legal Aid in Canada*, 1985 Statistics Canada, at 153 and 174-177.

46 The Law Society of Upper Canada. *Community Legal Services Report* 42 (Toronto: The Law Society, 1982).

fear of the socialization of the legal profession in terms of concern for the public.

Notwithstanding the profession's limited enthusiasm for clinics, offices continued to be established in several provinces, with funding principally from government-funded plans. By 1974, the Report of the Task Force on Legal Aid in Ontario (the Osler Report) took a positive attitude towards community legal services⁴⁷. This Commission recommended the ongoing funding of community clinics and the removal of the control of the legal aid plan from the legal profession.

Today the legal profession is active in virtually all aspects of the development and administration of legal aid. Within *judicare* jurisdictions most regions have Area Committees which are composed primarily of volunteer members who are generally lawyers who give their time both to set policy and to deal with appeals from refusal of service⁴⁸. As well, provincial plans are administered in some instances by committees of the provincial law societies which are again populated by senior members of the legal profession⁴⁹. The provincial base of legal aid, and the active involvement of the provincial law societies, have meant that the profession has been vigilant about government involvement and government attempts to restrict or reorganize legal aid. The Canadian legal profession has become committed to legal aid which is subsidized by government and the profession would tolerate neither an attempt to dismantle the existing programmes nor a massive reduction of government funding.

The profession's commitment to legal aid has been tested during the 1980s as both governments and their policies have changed. Legal aid schemes are perceived both as a financial burden and a potential threat to government policy. Effective legal aid schemes require governments to respond and to expend large amounts of public funds on services and programmes for traditionally unrepresented and often less-powerful members

47 *Supra*, note 43.

48 See Ontario's *Legal Aid Act*, *supra*, note 265, at s. 4.

49 See Ontario's *Legal Aid Act*, *id.* Section 2 stipulates that the Law Society is to establish and administer a legal aid plan and section 9 further provides for the creation of an advisory committee on legal aid composed of a judge of the Supreme Court, a judge of a county or district court, a provincial judge, two members of the bar of Ontario, and a person holding a responsible position in the field of public welfare. It is noteworthy that no mention of citizen participation is made or, for that matter, of client input. Similar provisions exist in New Brunswick. See the *Legal Aid Act*, R.S.N.B. 1973, c. L-2, ss. 2(1), 6(1).

of society. By the beginning of the 1980s, public funding for legal aid services was being curtailed in the wake of the economic recession. This required the profession to accept the dismantling of some legal aid programmes as well as cutbacks of both staff and client services. As no coherent rationale for legal aid had developed during its early period, the programmes and the role of lawyers in the administration and delivery of legal services were vulnerable to arbitrary cutbacks and, in some instances, to political attacks on the more creative programmes.

As mentioned earlier, diversity (judicare, community-based clinics and mixed-delivery schemes) is itself one of the most significant aspects of the development of legal aid in Canada. Professional pressure and concern about a movement away from the private sector has increased the involvement of lawyers in both the delivery of services and the administration of schemes. Legal aid has therefore become a growing preoccupation of the Canadian legal profession. The profession has supported those schemes which it has perceived to be beneficial and consonant with the leadership's perception of the professional project. It must be acknowledged that the profession's involvement has allowed for the support of many of the leaders of the profession and has, in some respects, prevented the abrupt changes in government attitude towards legal aid that characterized the American situation during the same period. As well, the profession has matured in its understanding the commitment to legal aid and particularly to a mixed model⁵⁰:

The Committee's central conclusion is that only a mixed model, with an adequate mix of staff, judicare and clinic models, can deliver effective legal aid services in Canadian jurisdictions. Once it is accepted that a mix of delivery models is necessary, much of the sterile debate of staff vs. judicare might be brought to a merciful end.

3. *Prepaid Legal Services*

The dispute that developed during 1985 between the United Auto Workers Canadian Legal Services Plan and the Law Society of Upper Canada is an example of a profession attempting to exert control over legal services in a manner which was generally perceived to be neither in the best interests of its members nor of the public⁵¹. Not unlike its re-

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sponse to community-based legal aid services over a decade earlier, the legal profession's fear of change and need to control new forms of legal services was evident in its reaction to prepaid legal services.

Though prepaid legal services and legal insurance had been discussed for more than a decade, it was not until the United Auto Worker's (now Canadian Autoworkers) 1984 agreement with General Motors that a large work-force was brought within a legal services plan in Canada. When the CAW included the same provisions in their contracts with Ford, Chrysler, and Navistar (formerly International Harvester) it became apparent that with over 75,000 union members⁵² in Ontario and Quebec, each receiving \$60.00 per year⁵³ from their employer for legal services, approximately 4.5 million new dollars were about to be expended annually in legal services. Although these funds are small in comparison to the provincial contributions to legal aid, they are nonetheless significant and were recognized by bar associations to be only the tip of the legal insurance iceberg⁵⁴.

The confrontation between a legal services plan created for one of Canada's largest unions and the country's most powerful law society had national implications. Initially, the Law Society of Upper Canada⁵⁵ took a supportive position with respect to prepaid legal services and was pre-

51 The Law Society was criticized by New Democratic Party leader Bob Rae as being "totally anti-diluvian" and "outrageous" as well as by the Ontario Law Association and some county bar associations for allowing any form of prepaid legal services.

52 When family members and retirees are included, the total covered by the plan exceeds 200,000.

53 The C.A.W. Legal Service Plan is funded by employer payment of three cents (temporarily increased to nine cents) per straight hour worked by each employee into a trust fund during the life of the collective agreement. The tripling of employer contributions was presumably in response to start up expenses and higher demand for services than anticipated.

54 A study conducted by the Essex Law Association for submission to the Law Society of Upper Canada pointed out that there were 3.5 million union members in Canada. If spouses and children were included, close to nine million Canadians would be included. If legal insurance was incorporated into all union contracts, \$175,000,000 new monies would be generated for legal services by employees or employers contributing \$60 per annum. It is estimated that in the United States, as many as 30 million people may be entitled to legal services as a fringe benefit to their employment.

55 The Law Society of Upper Canada in its first Communique Plus, of January 24th and 25th, 1985 stated that:

The Society, however, is impressed with the intention of the plans it has seen

50 *Supra* note 39 at 247.

pared to accept a closed or staff lawyer legal services plan as long it included a panel of cooperating lawyers. The Law Society went so far as to indicate that it was prepared to amend Rule 13 of its Rules of Professional Conduct to allow the plan to refer clients to either staff or cooperating lawyers. This position of general support was understandable. By 1985, Ontario had over a decade of experience with both staff lawyers and the private bar providing legal aid. The mixed delivery system was generally believed to be in the interest of both the profession and the public.

During 1985, the CAW plan began to be formalized and the agreement for cooperating lawyers was circulated with the proposed fee schedule of \$60.00 per hour. The extensive coverage of the plan and the growing economic concern, principally by local bar associations, prompted the Law Society to undertake a further examination. In October 1985, the Ontario legal profession's governing body added two further expectations: that plan members be allowed to utilize the services of any lawyer regardless of whether the lawyer had become a cooperating lawyer—this requirement implied the right to extra-bill the client for amounts above the plan's coverage; and secondly, the Law Society took the position that it had the right to participate in the formulation of what it considered to be an appropriate fee structure. The Law Society requirements of extra billing and a minimum tariff put it in direct confrontation with the creators of the CAW plan, who did not accept either of these changes.

In November 1985, The Treasurer wrote to the originators of the CAW plan and to the profession stating that participation in the plan might constitute unprofessional conduct⁵⁶. The profession's overzealous

and with the undoubted benefits that will flow from them to union members and today Convocation adopted a report of a special committee recommending that members of the Society be permitted to participate in prepaid legal service plans including those operating on a staff lawyer or panel basis provided that beneficiaries under such plans are able to select any staff or cooperating lawyer under the plan and that any lawyer who agrees to the terms of the plan can become a cooperating lawyer. . . . This will preserve the right of everyone covered under such a plan to choose his or her own lawyer. Rule 13 will be changed to permit steering under such plans.

56 Letter from Pierre Genest, Treasurer of the Law Society of Upper Canada to UAW Canadian Legal Services Plan, November 1st, 1985.

A press report of the growing confrontation between the Law Society and the UAW plan noted that lawyers could be "suspended or disbarred from practice where

response and its subsequent litigation were fueled by economic concerns with respect to fees as well as by the direct competition from the seven staff offices opened in southern Ontario communities. The presence of the staff offices providing legal services for family law, property matters—including purchase and sale of principal residences, leases, and landlord and tenant disputes, as well as representation in a variety of civil and minor criminal litigation—fueled local lawyers' fears that the new plan would be of limited direct benefit and might cut into their existing client base. The level of regional concern was highlighted by the independent litigation commenced by the Essex County Law Association against the CAW, the automobile manufacturers, and the plan administrators⁵⁷.

The Law Society and the Plan reached an interim agreement in December 1985. The Plan agreed to extra billing by non-cooperating lawyers and in return the profession agreed not to discipline participating lawyers. This questionable solution was to the plan to proceed to operate while the issues between the CAW and the Law Society were referred to the courts for a judicial determination. Issues were resolved informally in May 1987, when in the face, of the initial success of the Plan, the Law Society agreed not to have any role in setting the fee tariff, and the plan agreed to non-cooperating lawyers extra billing as well as to the continuation of a mixed delivery model.

The agreement allows the expansion of legal insurance plans in Canada and to the development of empirical data with respect to its utilization and impact. The initial data would indicate that there has been significant utilization of the Plan by over one half of all eligible employees. The growth of prepaid legal insurance and its provision of moderately priced legal services to middle income Canadians will be significant during the coming decade. The role models are being developed and the profession has come to recognize that it cannot work against both the need for legal

such conduct is found". It is highly unlikely that the Law Society would prosecute let alone disbar a lawyer for participating in the plan. See, Patricia Chisholm, "UAW's legal scheme angers many lawyers", *Inside Business*, December 28th, 1985.

57 There are no studies which indicate how new models of legal services will impact on the existing practitioners, in a community. Although lawyers had not provided services to most legal aid clients, there was nonetheless concern and opposition when community clinics with their salaried lawyers were introduced in Ontario in the early seventies. There has been a gradual recognition that by providing poor people with legal services, litigation is generated which requires representation by the private bar for landlords, small businessmen, and some opposing spouses.

advice and legal representation for Canadians of moderate means but must rather cooperate and encourage this new model of lawyering to flourish. Concerns with respect to free choice are unwarranted particularly in Oshawa and Windsor which ranked among the very lowest in Canada in terms of ratio of lawyers to citizens. Although lawyers may fear some economic dislocation, this attitude is both short-sighted and of limited utility. As the legal profession has done little to develop services for middle income Canada, its opposition will inevitably become supportive of this new market for legal services.